ANAFARTALAR CADDESI SDN BHD

v.

SOUTHERN INVESTMENT BANK BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD J
[CIVIL APPEAL NO: W-02-379-2002]
16 DECEMBER 2002

CIVIL PROCEDURE: *Execution - Stay - Application to stay order of High Court pending appeal to Court of Appeal - Courts of Judicature Act 1964, s. 44 - Whether party showed possibility of succeeding in appeal - Whether application to be granted*

The appellant was a shareholder of a company, Kredin Sdn Bhd, which was the registered owner of three pieces of property ('the said lands'). The said lands were purchased by the respondent through a public auction, pursuant to an order for sale made by the High Court under s. 256 of the National Land Code ('NLC'). The respondent was accordingly issued with Form 16F, a certificate of sale. Kredin was later wound up for failing to settle a debt amounting to more than RM8 million. The appellant then entered a caveat against the said lands. Upon the respondent's application, the High Court ordered the removal of the said caveat and also refused the appellant's application for a stay of execution. The appellant appealed to the Court of Appeal against the High Court's decision in ordering the removal of the caveat ('the said appeal'). That hearing was still pending. The appellant then applied to this court under s. 44 of the Courts of Judicature Act 1964 for a stay pending the said appeal.

Held:
Per Abdul Aziz Mohamad J

[1] Applying the rule in *Foss v. Harbottle*, the appellant was precluded from suing the respondent for any relief on the basis of any complaint about the sale by auction of Kredin's lands to the respondent. Only Kredin or, in its liquidation, the liquidator could sue the respondent on such a complaint. Since the appellant had no *locus standi* to challenge the respondent's *prima facie* position as a purchaser of the said lands conferred

by Form 16F, it had no reasonable prospect of being able to argue in the said appeal that the respondent was not a body aggrieved under s. 327 of the NLC. The respondent's grievance was manifest in that the appellant's caveat had prevented it from rightfully getting on the register of titles. There was little likelihood that the appellant would succeed in the said appeal on the question of body aggrieved and of caveatable interest. (p 7 b-f)

[Appellant's application for stay pending appeal refused.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah pemegang saham syarikat Kredin Sdn Bhd yang merupakan pemilik berdaftar hartanah berkenaan. Hartanah berkenaan kemudiannya dibeli oleh responden melalui suatu lelongan awam, akibat daripada suatu perintah jual yang dibuat oleh Mahkamah Tinggi di bawah s. 256 Kanun Tanah Negara ('KTN'). Sehubungan itu, Borang F iaitu sijil pembelian, diberikan kepada responden. Kredin kemudiannya digulung kerana gagal menyelesaikan hutangnya berjumlah lebih dari RM8 juta. Setelah itu, perayu telah memasukkan kaveat ke atas tanah berkenaan. Mahkamah Tinggi telah memerintahkan pembatalan kaveat tersebut atas permohonan responden dan juga telah menolak permohonan perayu untuk penggantungan pelaksanaan perintah tersebut. Perayu telah membuat rayuan ke Mahkamah Rayuan ('rayuan tersebut') terhadap keputusan Mahkamah Tinggi membatalkan kaveatnya. Perbicaraan tersebut masih belum selesai. Perayu kemudiannya telah memohon ke mahkamah ini di bawah s. 44 Akta Mahkamah Kehakiman 1964 untuk penggantungan pelaksanaan sehingga selesainya rayuan tersebut.

Diputuskan:

Oleh Abdul Aziz Mohamad H

[1] Berpandukan rukun dalam kes *Foss v. Harbottle*, perayu tidak dibenarkan membawa tindakan ke atas responden untuk mendapatkan relif berlandaskan sungutan mengenai jualan lelong tanah Kredin kepada responden. Hanya Kredin atau pelikiudasinya boleh membawa tindakan terhadap responden atas alasan sedemikian. Oleh kerana perayu tidak mempunyai *locus standi* untuk mencabar taraf *prima facie* responden sebagai pembeli tanah tersebut berasaskan Borang 16F, maka ia mungkin tidak dapat menghujah bahawa responden bukan suatu pihak terkilan di bawah s. 327 KTN dalam rayuan tersebut. Aduan responden sememangnya nyata kerana kewujudan kaveat perayu tidak membenarkannya untuk mendaftarkan haknya sebagai pemilik di daftar hakmilik. Kemungkinan perayu untuk mendapatkan penghakiman yang berpihak padanya dalam rayuan tersebut adalah tipis berpandukan isu pihak terkilan dan kepentingan berkaveat.

Permohonan perayu untuk penggantungan pelaksanaan sehingga selesainya rayuan tersebut ditolak.]

Case(s) referred to:
Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd [1995] 4 CLJ 551 CA ***(refd)***
Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***
Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA ***(refd)***
Wallersteiner v. Moir (No 2) [1975] 2 WLR 389 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44
National Land Code, ss. 256, 259(3), 264, 323(1), (2), 327(1)

For the appellant - Bastian Pius Vendargon; M/s Jayaraman, Ong & Co
For the respondent - Lambert Rasa-Ratnam (Sean HM Yeow); M/s Lee Hishammuddin

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S1-24-296-2002]

Reported by M Maheswaran

JUDGMENT

Abdul Aziz Mohamad J:
On 15 July 2002 we dismissed the appellant company's notice of motion for an order under s. 44 of the Courts of Judicature Act 1964 staying the execution of an order of the High Court at Kuala Lumpur made on 7 May 2002 pending the appellants' appeal to this court against that order, which was an order for the removal of a private caveat entered by the appellants against three lands whose registered owner was at all material times a company whose former name was Kredin Sdn Bhd ("Kredin"). The appellant company were a shareholder in Kredin. The High Court had dismissed the appellants' application for a stay of execution.

The High Court had, on 18 March 1985 and under s. 256 of the National Land Code, ordered the three lands to be sold by public auction. At the sale on 12 July 1993 the respondents were the successful bidder. On 6 August 1993 Form 16F was received by the respondents.

Form 16F is a certificate of sale, signed by the proper officer of the court, which according to s. 259(3) of the National Land Code the purchaser at a sale under s. 256 is entitled to receive upon payment to the officer of the full amount of the purchase price and which, according to s. 267, is registrable by the purchaser as if it were an instrument of dealing. As in every other case, the certificate of sale received by the respondents in this case acknowledged receipt of the full amount of the purchase price.

Despite obtaining Form 16F, the respondents could not be registered as the proprietor of the lands because of the existence of caveats by Kredin against the lands. There were five caveats entered on different dates.

On 14 November 2000, on the respondents' petition, Kredin were ordered to be wound up for failure to pay a debt of RM8,447,433.76.

Of Kredin's five caveats, one lapsed, and the other four the respondents successfully applied to be removed. The last caveat to be removed was removed on 17 September 2001.

Eleven days later, on 28 September 2001, the appellants entered the caveat the removal of which by the High Court on 7 May 2002 is the subject of a pending appeal to this court by the appellants.

According to s. 323(1) of the National Land Code, a private caveat may be entered only at the instance of the following persons or bodies:

> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

Subsection (2) of s. 323 requires the applicant for the entry of a private caveat to state in the application, Form 19B, "the nature of the claim on which his application is based". To comply with that requirement, what the appellants stated in their application form was that the respondents had obtained the Form 16F, the certificate of sale, without payment of the purchase price and that the appellants' purpose in entering the caveat was to ensure that Kredin's registered proprietorship of the lands was not lost.

On 14 February 2002 the appellants filed a writ action against the respondents (S7-22-162-2002) seeking certain declarations, one of which is a declaration that the respondents have not purchased the lands. The appellants' reason for alleging that the respondents had not purchased the lands may be inferred from para. 12(6) of the statement of claim where it is alleged that the respondents had paid to the court only 10% the purchase price and not the full amount of the purchase price. Paragraph 17 of the statement of claim states that the appellants had lodged the private caveat "to protect its caveatable interest pending due determination of the issues herein to maintain the *status quo* from being irreparable *(sic)* lost".

In submission before us the respondents' counsel admitted that the purchase price (or part of it) was paid by "contra", the mechanics of which it was not necessary to explain for the disposal of the appellants' application before us for a stay of execution of the order of removal of the caveat, and were not explained.

Although the hearing before us was not of the appeal against the removal of the caveat, it was clear from the appellants' statement of the nature of their claim that they made in their application for the entry of the private caveat that their claim did not fall under any of the paras. (a), (b) and (c) of s. 323(1) and that they were not therefore a body at whose instance a private caveat may be entered. In other words, going by their own claim, they had no *locus standi* to have a caveat entered.

Before us, the appellants' counsel sought to base the appellants' *locus standi* on a claim which was different from what they had stated in their caveat application. Apart from such a change of ground not being permissible, as stated by this court in *Goh Paik Swan v. Ng Choo Lum @ Ng Poon Lum* [1997] 1 CLJ 77 at p. 87b, we saw no merit in the argument for the new claim.

The argument had been raised in submission in the High Court on the respondents' application for removal of the caveat. There the appellants did not dispute that the position in law is that a shareholder of a company has no interest in the assets of the company. But they argued that that is the position of a shareholder where the company is not wound up, but where a company, like Kredin, is wound up, they argued that the position is different and they based their argument on s. 264 of the Companies Act 1965, and it was on s. 264 that their counsel based their argument before us.

Section 264 is in fact applicable only to a voluntary winding up. It provides as follows:

> Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied *pari passu* in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

The argument of the appellants' counsel amounted to this, that by virtue of the fact that in Kredin's liquidation the appellants, as a member of Kredin, would be entitled to a share in the surplus property, if any, of Kredin, the appellants fell under para. (a) of s. 323(1) of the National Land Code as a "body claiming title to, or any registrable interest in, (the lands) or any right to such title or interest". It amounted to saying that after a company whose

property includes land has been ordered to be wound up, if there is, after paying off creditors, to be surplus property to which the members of the company are entitled, they have title, or a right to title, to the land and therefore may be registered as the proprietors of the land, or they have an interest, or a right to an interest, in the land that may be registered, and each of them may lodge a private caveat against the land by virtue of para. (a) of s. 323(1) to prevent any dealing with the land pending the realization of their claims. We rejected the proposition as an absurdity that would turn the business of winding up of companies topsy-turvy.

As a point on which the appellants placed hopes for a chance of success in the pending appeal, their counsel placed before us the proposition that the respondents were not a "body aggrieved" and therefore did not have *locus standi* under s. 327(1) of the National Land Code to apply for the removal of the caveat because they were not, it was argued, a purchaser of the lands, not having paid the entire amount of the purchase price to the proper officer of the court.

Prima facie, having been given the Form 16F, the respondents must be recognized as the purchaser of the lands and as being entitled to be registered as the proprietor of the lands. Whether the respondents had paid the purchase price in a manner that the law requires or allows is the subject of the appellants' action in S7-22-162-2002. The aim of that action is to show that Kredin had been defrauded in that the respondents were recognized by the proper officer of the court as the purchaser of the lands when they had not paid for the lands in the way in which they should have. The purpose of the appellants' caveat was to preserve the lands in the name of Kredin pending the determination of the appellants' action.

Before us, the respondents' counsel submitted to the effect that the appellants, as a member or contributory of Kredin, had no right and therefore no *locus standi* to sue for any wrong done to Kredin. The basis of the submission was the rule in *Foss v. Harbottle* [1843] 2 Hare 461, about which Lord Denning had this to say in *Wallersteiner v. Moir (No. 2)* [1975] 2 WLR 389 at p. 395:

> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle* [1843] 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue.

See *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 4 CLJ 551.

We agreed that the rule in *Foss v. Harbottle* [1843] 2 Hare 461 precluded the appellants from suing the respondents for any relief on the basis of any complaint about the sale by auction of Kredin's lands to the respondents. Only Kredin or, in their liquidation, their liquidator can sue the respondents on such a complaint. The appellants had no *locus standi* to challenge, on the basis of any such complaint, the respondents' *prima facie* position as the purchaser of the lands. Only Kredin or their liquidator could do that. Kredin had in fact done so by filing action 22-129-97 on 11 March 1997 before they were ordered to be wound up but that action was struck off on 17 September 2001, after they had been ordered to be wound up, because their provisional liquidator did not appear in court for case management. On 11 March 2002 they filed a notice of motion for extension of time to appeal to this court. The motion is pending in this court.

Since the appellants had no *locus standi* to challenge the respondents' *prima facie* position as purchaser of the lands, they had no reasonable prospect of being able to successfully argue in the appeal that the respondents were not a body aggrieved under s. 327(1) of the National Land Code. The respondents' grievance was manifest. The appellants' caveat prevented them, the possessor of the certificate of sale Form 16F, from getting on the register of titles.

On both the question of body aggrieved and the question of caveatable interest, it was plain and obvious to us that the appeal could not succeed. For that reason we refused a stay pending appeal.